Supreme Court, U.S.
FILED
OCT 30 2001
OFFICE OF THE CLERK

No. 00-1072

In The

Supreme Court of the United States

LEONARD EDELMAN,

Petitioner,

v.

LYNCHBURG COLLEGE,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF FOR RESPONDENT

ALEXANDER W. BELL
Counsel of Record
MARY V. BARNEY
BELL & BARNEY, PLC
715 Court Street
P. O. Box 739
Lynchburg, VA 24505-0739
434-528-0411

Attorneys for Respondent

BEST AVAILABLE COPY

QUESTION PRESENTED

This Court granted *certiorari* on the following question:

I. Is 29 C.F.R. §1601.12(b), which provides that a Title VII "charge may be amended to cure technical defects or omissions, including the failure to verify the charge," invalid?

TABLE OF CONTENTS

Page

Question Presented i

Table of Contents ii

Table of Cited Authorities iv

Statute and Regulation Involved 1

Statement of the Case 5

Summary of Argument 13

Argument 14

I. THE EEOC REGULATION IS INVALID BECAUSE IT IS INCONSISTENT WITH THE PLAIN MEANING OF THE STATUTE. 14

A. The EEOC Regulation Conflicts With The Plain Meaning Of The Statute. 16

B. The Legislative History Supports The Plain Meaning Of The Statute. 20

C. Policy Considerations Do Not Justify Deviating From The Plain Meaning Of The Statute 25

II. THE EEOC REGULATION RELIED ON BY PETITIONER IS ENTITLED TO NO DEFERENCE. 28

A. *Chevron* Deference Is Inappropriate. 29

1. Any *Chevron* Inquiry Should End At Step One. 29

2. The Regulation Is Unreasonable At *Chevron* Step Two. 31

B. Deference Is Inappropriate Under *Skidmore* 35

III. INVALIDATING §1601.12(B) WILL NOT UNDULY HAMPER THE ACCESS OF INDIVIDUALS TO THE REMEDIES PROVIDED IN TITLE VII. 39

Conclusion 40

TABLE OF CITED AUTHORITES

Page(s)

CASES:

Agostini v. Felton, 521 U.S. 203 (1997) 11

Becker v. Montgomery, 121 S.Ct. 1801 (2001)..... 33

Belcher v. Stengel, 429 U.S. 118 (1976)..... 12

Blue Bell Boots, Inc. v. Equal Employment Opportunity Commission, 418 F.2d 355 (6th Cir. 1969) 22

Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984) ..... *passim*

Choate v. Caterpillar Tractor Company, 402 F.2d 357 (7th Cir. 1968)..... 22, 36

Christensen v. Harris County, 529 U.S. 576 (2000)..... 29

Croushorn v. Board of Trustees of University of Tennessee, 518 F.Supp. 9 (M.D.Tenn. 1980)..... 28

Delaware State College v. Ricks, 449 U.S. 250 (1980)..... 34

Early v. Bankers Life and Casualty Co., 959 F.2d 75 (7th Cir. 1992)..... 34

EEOC v. Arabian American Oil Company, 499 U.S. 244 (1991)..... 29, 35, 37

EEOC v. Commercial Office Prods. Co., 486 U.S. 107 (1988)..... 7, 18, 29, 37

Evans v. Technologies Applications & Service Co., 80 F.3d 954 (4th Cir. 1996)..... 6

General Electric Co. v. Gilbert, 429 U.S. 125 (1976)..... 30, 37

Georgia Power Company v. Equal Employment Opportunity Commission, 412 F.2d 462 (5th Cir. 1969) 22

Knox v. State of Indiana, 93 F.3d 1327 (7th Cir. 1996)..... 27

Kotcher v. Rosa and Sullivan Appliance Center, Inc., 957 F.2d 59 (2nd Cir. 1992)..... 27

Laughlin v. Metropolitan Washington Airports Authority, 149 F.3d 253 (4th Cir. 1998).. 27

Lawrence v. Cooper Communities, Inc., 132 F.3d 447 (8th Cir. 1998)..... 40

Love v. Pullman, 404 U.S. 522 (1972)..... 26

Messinger v. Anderson, 225 U.S. 436 (1912) 11

Mohasco Corp. v. Silver, 447 U.S. 807 (1980)..... *passim*

Novotny v. Great American Federal Savings & Loan Assoc., 584 F.2d 1235 (3rd Cir. 1978) 27

Pijnenberg v. West Georgia Health System, Inc., 255 F.3d 1304 (11th Cir. 2001)..... 27

Robinson v. Shell Oil Co., 519 U.S. 337 (1997) 16, 31

Sias v. City Demonstration Agency,
588 F.2d 692 (9th Cir. 1978)..... 28

Skidmore v. Swift & Co.,
323 U.S. 134 (1944)..... 14, 35, 36, 37

Smith v. Golf Enterprises, 1997 WL 279814
(N.D.Tex. 1997)..... 28

Sutton v. United Airlines, 527 U.S. 471 (1999) 20

The Monrosa v. Carbon Black Export, Inc.,
359 U.S. 180 (1959)..... 11

Tinsley v. First Union National Bank,
155 F.3d 435 (4th Cir. 1998)..... 7

Troy v. Bay State Computer Group, Inc.,
1994 WL 562591 (D.Mass. 1994)..... 28

*Union Starch & Refining Co. v. National Labor
Rel. Bd.*, 186 F.2d 1008 (7th Cir. 1951)..... 32

U.S. v. Mead Corp.,
121 S.Ct. 2164 (2001)..... 14, 29, 30, 36, 37

U.S. v. Haggar Apparel Co., 526 U.S. 380 (1999) 31

Vason v. Montgomery, 240 F.3d 905 (11th Cir. 2001) 22

*Weeks v. Southern Bell Telephone & Telegraph
Company*, 408 F.2d 228 (5th Cir. 1969) 22

*W.R. Grace & Co. v. Local Union 759, International
Union of United Rubber, Cork, Linoleum and
Plastic Workers of America*,
461 U.S. 757 (1983)..... 34

Zipes v. Trans World Airlines, Inc.,
455 U.S. 385 (1982)..... 26, 40

OTHER AUTHORITIES:

Civil Rights Act of 1964, §706 ..... *passim*

Civil Rights Act of 1964, §706(a)..... 1, 21

Civil Rights Act of 1964, §706(b) ..... *passim*

Civil Rights Act of 1964, §706(c)..... 18, 28

Civil Rights Act of 1964, §706(e)..... 2, 15, 17, 18, 31

29 U.S.C. §160(b) 32

42 U.S.C. §2000e-3(a) 27

42 U.S.C. §2000e-5(b) 15, 30

42 U.S.C. §2000e-5(e) 7, 15, 17

42 U.S.C. §2000e-8(b) 18

42 U.S.C. §2000e-12(e) 29

29 C.F.R. §1601.12 ..... 3, 39

29 C.F.R. §1601.12(a)..... 16

29 C.F.R. §1601.12(b) ..... *passim*

16 C.F.R. §1601.12(b)(1)(v)(A)..... 18

29 C.F.R. §1601.13(a)(4)..... 10

29 C.F.R. §1601.14..... 10

Fed. R. Civ. P. 15..... 32

110 CONG. REC. 8193, 13087 (1964)..... 25

118 CONG. REC. 2182-83 (1972) 21, 22, 23

31 Fed. Reg. 10,269 (1966)..... 36

42 Fed. Reg. 55,388 (1977)..... 36

H.R. CONF. REP. NO. 92-899, 92D CONG., 2D SESS. (1972), *reprinted in* LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972 (1972)..... 24

STAFF OF SENATE SUBCOMM. ON LABOR OF THE COMM. ON LABOR AND PUBLIC WELFARE, 92D CONGRESS, 1ST SESS., PROPOSED EQUAL EMPLOYMENT OPPORTUNITIES ENFORCEMENT ACT OF 1971, (Comm Print 1971), *reprinted in* LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972 (1972)..... 20, 24

STAFF OF SENATE SUBCOMM. ON LABOR OF THE COMM. ON LABOR AND PUBLIC WELFARE, 92D CONGRESS, 2D SESS., TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 SHOWING CHANGES MADE BY PUBLIC LAW 92-261 APPROVED MARCH 24, 1972 (Comm. Print 1972), *reprinted in* LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972 (1972)..... 24

S. REP. NO. 92-415, 92D CONG., 1ST SESS. (1971), *reprinted in* LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972 (1972)..... 24

STATUTE AND REGULATION INVOLVED

Sections 706(a), (b) & (e) of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e-5, provide:

> (a) Power of Commission to prevent unlawful employment practices
>
> The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 2000e-2 or 2000e-3 of this title.
>
> (b) Charges by persons aggrieved or member of Commission of unlawful employment practices by employers, etc.; filing; allegations; notice to respondent; contents of notice; investigation by Commission; contents of charges…
>
> Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management

committee (hereinafter referred to as the "respondent") within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires....

....

(e) Time for filing charges; time for service of notice of charge on respondent; filing of charge by Commission with State or local agency; seniority system.

(1) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the

proceedings under State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

The EEOC regulation in question, 29 C.F.R. §1601.12, provides:

Contents of charge; amendment of charge.

(a) Each charge should contain the following:

(1) The full name, address and telephone number of the person making the charge except as provided in §1601.7;

(2) The full name and address of the person against whom the charge is made, if known (hereinafter referred to as the respondent);

(3) A clear and concise statement of the facts, including pertinent dates, constituting the alleged unlawful employment practices: See §1601.15(b);

(4) If known, the approximate number of employees of the respondent employer or the approximate number of members of the respondent labor organization, as the case may be; and

(5) A statement disclosing whether proceedings involving the alleged unlawful employment practice have been commenced

before a State or local agency charged with the enforcement of fair employment practice laws and, if so, the date of such commencement and the name of the agency.

(b) Notwithstanding the provisions of paragraph (a) of this section, a charge is sufficient when the Commission receives from the person making the charge a written statement sufficiently precise to identify the parties, and to describe generally the action or practices complained of. A charge may be amended to cure technical defects or omissions, including failure to verify the charge, or to clarify and amplify allegations made therein. Such amendments and amendments alleging additional acts which constitute unlawful employment practices related to or growing out of the subject matter of the original charge will relate back to the date the charge was first received. A charge that has been so amended shall not be required to be redeferred.

STATEMENT OF THE CASE

Lynchburg College ("the College") hired Leonard Edelman as an Assistant Professor of biology in August 1993. Three years later, in the fall of 1996, Edelman filed an application for tenure—the award of a lifetime employment contract at the College. As is customary in such cases, his application was considered independently by his teaching colleagues, the College administration, and ultimately the College's Board of Trustees. Though supported by his faculty colleagues, his application was not supported by the administration and was rejected by the Board of Trustees on May 23, 1997.[1] While notice of the Board's action was sent to Edelman on the day the decision was made, Edelman claims that he did not receive the notice until June 6, 1997.

Edelman filed a lawsuit against the College alleging that he had been subjected to discrimination during the course of his employment (Count One) and denied tenure and retaliated against by the College (Count Two) because of his gender (male), ethnicity (Polish), religion (Jewish), and age (47) "in violation of Title VII of the Civil Rights Act of 1964, as amended; and other civil and criminal statutes." Edelman also asserted claims under Virginia common law for negligent retention (Count Three), breach of contract (Count Four), intentional infliction of emotional distress (Count Five), and defamation (Count Six). JA 6-21.[2]

---

[1] As is customary at the College, Edelman was granted a one-year terminal teaching contract following the denial of tenure. This contract lapsed by its own terms in May 1998.

[2] Edelman initially filed his lawsuit against the College in state court, alleging state law claims of wrongful termination, breach of contract, and intentional infliction of emotional distress. The College removed the action to federal court after Edelman amended his complaint to assert causes of action under Title VII, and to add state law claims for defamation and negligent retention.

As a preliminary step in making his Title VII claims, Edelman had faxed a letter to the EEOC on November 14, 1997. JA 47-53. The letter was a "request to file a charge of employment discrimination against Lynchburg College in regards to their personnel decisions concerning me during January-June 1997 culminating in the denial of my continued employment at the college." JA 48. In the letter, Edelman asserted that his case "is one of gender-based employment discrimination, exacerbated by discrimination on the basis of my family's national origin and religion." JA 52. He did not mention age discrimination or Title VII retaliation.[3] Edelman concluded his letter by stating that the EEOC would shortly be hearing from his attorneys concerning his claim. JA 53.[4]

Edelman's November 14 letter was not sworn to under oath, either at the time it was sent to the EEOC or at any time thereafter. The EEOC did not assign a charge number to the letter. The EEOC did not send the letter to the Virginia Council on Human Rights (VCHR), the Virginia state deferral agency. Nor did the EEOC send to Lynchburg College either a copy of the letter or a notice of a charge of discrimination based on the letter.[5]

---

[3] Edelman has not mentioned the district court's dismissal of his age discrimination and Title VII retaliation claims in any of his briefs on appeal. It appears therefore that he has abandoned these claims. This is perhaps because these claims exceed even the scope of Edelman's November 1997 letter to the EEOC, and were therefore never properly asserted in his lawsuit even under Edelman's current theory of the case. *Evans v. Technologies Applications & Service Co.*, 80 F.3d 954, 962-63 (4th Cir. 1996).

[4] Professor Edelman has at all times been represented both before the EEOC and in the courts by at least two law firms. He is therefore a most unlikely representative for the interests of the uneducated, unrepresented victims of discrimination he seeks to champion on this appeal.

[5] In fact, one of Edelman's two attorneys specifically asked the EEOC not to send Edelman's formal charging documents to the College

The EEOC responded to Edelman's November 14 letter in a December 3, 1997 letter to him stating that "additional information is needed before we can pursue this matter," urging Edelman to schedule an interview to provide more information "as soon as possible because a charge of discrimination must be filed within the time limits imposed by law...." JA 56-57. The EEOC further admonished Edelman that if he did not contact the EEOC to schedule an interview, the agency would assume he "did not intend to file a charge of discrimination." *Id.*

The EEOC sent Edelman an appointment notice on February 17, 1998 scheduling an interview for March 3, 1998, reminding him that he had "180 days from the date of the alleged violation to file a charge" with the EEOC. JA 58-59.[6]

On March 18, 1998, the EEOC sent Edelman a letter enclosing an EEOC Form 5 Charge of Discrimination based on the information he had provided in his March 3, 1998 interview. JA 60-61, 62-63. This was 285 days after the June 6, 1997 accrual date alleged by Edelman, and 15 days

---

until Edelman had a "personal interview" with an EEOC investigator. JA 54.

[6] Claimants have 180 days to file charges of discrimination with the EEOC in states that do not have agencies with "authority to grant or seek relief" from discriminatory employment practices. 42 U.S.C. §2000e-5(e)(1). Claimants have 300 days to file charges with the EEOC in states having such agencies. *Id.* These states are sometimes referred to as "deferral" states. See *EEOC v. Commercial Office Prods. Co.*, 486 U.S. 107 (1988).

Subsequent to the EEOC's February 17, 1998 letter to Edelman, Virginia was adjudicated to be a "deferral" state in *Tinsley v. First Union National Bank*, 155 F.3d 435, 440 (4th Cir. 1998), decided on September 2, 1998. Edelman therefore had 300 days from the accrual date of June 6, 1997—until April 2, 1998—to file his charge of discrimination with the EEOC.

prior to the statutory deadline for filing a charge with the EEOC. The Charge of Discrimination form alleged gender discrimination and nothing else. JA 63.[7] The transmittal letter urged Edelman to make and initial any "corrections or additions" on the Form 5 charge. Despite this adjuration, Edelman did not check any of the boxes on the Form 5 charge indicating that he was making a discrimination claim on any grounds other than sex discrimination. JA 63. He added nothing to the body of the draft Charge of Discrimination mentioning the religion or national origin allegations he had made in his November 14, 1997 letter to the EEOC, and which he later asserted in his lawsuit against the College. Indeed, in the Charge of Discrimination, Edelman did not mention his November 14, 1997 unsworn letter to the EEOC at all. *Id.*

The March 18, 1998 transmittal letter from the EEOC also instructed Edelman to sign the charge "in the bottom left hand block" of the Form 5, which contained the affirmation of the truth of the charge required by Title VII. JA 60, 63. The letter went on to state that if Edelman did not return the Form 5 Charge of Discrimination to the EEOC, his charge would "not be processed." JA 61.

Edelman did not file his verified Charge of Discrimination with the EEOC until almost a month later, on April 15, 1998 (JA 67)—313 days after the June 6, 1997 accrual date. The charge was then assigned a charge number by the EEOC, and on April 21, 1998, the EEOC forwarded the charge to the College for a response. JA 64-66. The EEOC never sent Edelman's unsworn November 14 letter to the College during the course of processing Edelman's

[7] The EEOC's notes from Edelman's March 3, 1998 interview with the agency state "religious and national origin discrimination discounted. Do not include as a basis." JA 88.

complaint.[8] Moreover, the EEOC never sent a copy of the letter to the VCHR.[9] The EEOC issued a right-to-sue notice to Edelman on March 29, 1999, and Edelman's Title VII lawsuit followed.

The district court dismissed Edelman's Title VII claims on the grounds that Edelman had failed to file his charge of discrimination within the 300-day limitations period set out in Title VII.[10] The district court acknowledged that Edelman had written the letter to the EEOC on November 14, 1997, within the limitations period, but ruled that the record demonstrated that neither Edelman nor the EEOC had proceeded as if they regarded that letter to be a "charge" within the meaning of Title VII:

- The letter was never verified, as is required for "charges" by Title VII (JA 28);

- The EEOC follow-up letters to Edelman had indicated his letter was not sufficient to constitute a charge (*Id.*);

[8] The letter was made available to the College in response to a Freedom of Information Act request only after the EEOC had closed its administrative file and issued Edelman a right-to-sue.

[9] It appears from the record that the EEOC may have sent a copy of Edelman's Form 5 Charge of Discrimination to the VCHR on April 21, 1998, 319 days after the alleged discrimination. JA 67-68. However, VCHR records indicate that the charge was not received and logged in with that agency as a "dual-filed" charge until June 4, 1998, after the College had filed its response to the charge, including a challenge to its timeliness. Court of Appeals JA 59.

[10] After dismissing the Title VII claims, the federal district court remanded Edelman's state law claims to the Virginia Circuit Court for the City of Lynchburg. Those claims, including Edelman's breach of contract and wrongful discharge claims, were dismissed by the Lynchburg Circuit Court as inadequate as a matter of state law. JA 91-93. The Virginia Supreme Court found no reversible error in the Circuit Court's judgment and refused Edelman's petition for appeal. JA 94.

- The EEOC never served the letter or a notice of the letter either on the College or the Virginia Council on Human Rights, as is required for "charges" by both Title VII and EEOC regulations (*Id.*);[11]

[11] The EEOC regulation at 29 C.F.R. §1601.14 provides in pertinent part that:

> [w]ithin ten days after the filing of a charge in the appropriate Commission office, the Commission shall serve respondent a copy of the charge, by mail or in person, except when it is determined that providing a copy of the charge would impede the law enforcement functions of the Commission. Where a copy of the charge is not provided, the respondent will be served with a notice of the charge within ten days after the filing of the charge. The notice shall include the date, place and circumstances of the alleged unlawful employment practice. Where appropriate, the notice may include the identity of the person or organization filing the charge.

The EEOC regulation at 29 C.F.R. §1601.13(a)(4) provides in pertinent part:

> (i) Where any document, whether or not verified, is received by the Commission as provided in §1601.8 which may constitute a charge cognizable under Title VII or the ADA, and where the FEP agency has not waived its right to the period of exclusive processing with respect to that document, that document shall be deferred to the appropriate FEP agency as provided in the procedures set forth below:
>
> (A) All such documents shall be dated and time stamped upon receipt.
>
> (B) A copy of the original document shall be transmitted by registered mail, return receipt requested, to the appropriate FEP agency, or, where the FEP agency has consented thereto, by certified mail, by regular mail or by hand delivery. State or local proceedings are deemed to have commenced on the date such document is mailed or hand delivered.

- The EEOC never assigned a charge number to the letter (*Id.*); and

- No reference was made to the letter in the Charge of Discrimination filed by Edelman with the EEOC on April 15, 1998 (*Id.*).

On this basis, the district court ruled that 29 C.F.R. §1601.12(b), the EEOC regulation allowing "technical" amendments to a charge, including verification, to relate back to the initial filing date of the charge was inapplicable in this case, since the "November 14, 1997 letter did not constitute a charge" to which the April 15, 1998 charge could relate back. JA 28-29.[12] The validity *vel non* of the EEOC regulation was simply irrelevant to the outcome of the case.[13]

[12] In so ruling, the district court necessarily rejected the after-the-fact assertion in the declarations filed in the district court by the EEOC asserting that the agency had regarded Edelman's November 14, 1997 letter to be a "minimally sufficient charge." JA 78-82. The EEOC's own conduct during the administrative process belied that assertion.

The finding by the district court that the November 14, 1997 letter was not a "charge" because neither Edelman nor the EEOC treated it as such was not appealed, either to the court of appeals or to this Court, and therefore would not be open to relitigation on remand. See *Agostini v. Felton*, 521 U.S. 203, 236 (1997), *citing Messinger v. Anderson*, 225 U.S. 436, 444 (1912). The EEOC's suggestion that the College should be free to argue this as an alternative ground of decision on remand is therefore puzzling, if not disingenuous. The College has already done so, and prevailed on that ground.

[13] It is for this reason that this case is an inappropriate vehicle for review of the validity of the EEOC regulation. The College reiterates the position set out in its brief in opposition to *certiorari* and urges the Court to dismiss the writ as improvidently granted. As this Court has noted, "[w]hile this Court decides questions of public importance, it decides them in the context of meaningful litigation. Its function in resolving conflicts among the Courts of Appeals is judicial, not simply administrative or managerial." *The Monrosa v. Carbon Black Export,*

The district court also rejected Edelman's estoppel argument based on the statement by one of his lawyers in a November 26, 1997 letter to the EEOC (JA 54-55) that counsel "understood" that any charge subsequently filed by Edelman would relate back to November 14, 1997. This letter was never responded to by the EEOC. As the district court noted, a party's statement as to what the party "understands" as to the filing date does not trump the actual requirements of Title VII. JA 29. It is significant that the EEOC did not say even in its post-hoc declarations that it had ever affirmed counsel's "understanding." JA 78-82.

The district court's ruling was affirmed by the Court of Appeals for the Fourth Circuit. The majority of the panel affirmed on the grounds that the EEOC regulation allowing relation-back of "technical" amendments to charges was invalid to the extent it could be read as allowing verification of a charge after passage of the statutory limitations period.[14] The majority reasoned that

> [w]hile Congress expressly delegated to the EEOC the power to delineate the form and content of the charge, it did not give the EEOC authority to tamper with the oath or writing requirements. Nor did Congress give the EEOC authority to alter the limitations period. On the contrary, the statute affirmatively and plainly established the time period within which a charge must be filed ....Because a charge requires verification...and because a charge must be filed within the limitations period..., it follows that a charge must be verified within the limitations period. Thus, to the extent that the regulation permits a charge to be verified after the expiration of the limitations period, it thwarts the plain language of Title VII (citations omitted).

JA 37.

While Judge Luttig felt the majority's construction of the statute was "the better interpretation" (JA 46), he was "uncomfortable" with ruling that the EEOC regulation was invalid, in view of *Chevron's* requirement of mandatory judicial deference to "plausible" agency interpretations of ambiguous statutory terms. Judge Luttig would have affirmed on grounds essentially identical to that of the district court: that on the facts of this case, neither Edelman nor the EEOC treated Edelman's unsworn November 14, 1997 letter as a charge to which the late-filed sworn charge could relate back. JA 45.

This Court granted *certiorari* solely on the issue whether the EEOC regulation is valid.

SUMMARY OF ARGUMENT

The plain meaning of the statute in this case is that EEOC charges must be timely filed in writing and under oath, and served on employers within ten days of filing. This reading of the statute is supported by its language, the context in which it is used, the broader context of the statute

---

Inc., 359 U.S. 180, 184 (1959). *Accord*, *Belcher v. Stengel*, 429 U.S. 118 (1976).

[14] Judge Beezer's opinion for the majority erroneously stated that the College had conceded that if the EEOC regulation was valid, Edelman's charge was timely. The College made and makes no such concession. On the contrary, the College does not believe the validity *vel non* of the EEOC regulation is outcome-determinative in this case for the reasons stated by the district court, by Judge Luttig on appeal, and by the College in its brief in opposition to *certiorari*.

as a whole, and by its legislative history. Congress did not authorize the EEOC to alter these statutory requirements. By promulgating a regulation that allows the "relation back" of oaths, thus relaxing the limitations period and effectively eliminating the prompt notice requirement in the statute, the EEOC has gone considerably beyond its statutory authority to establish procedures for processing charges of discrimination. Rather than merely establish procedures, it has promulgated a regulation that upsets the statutory scheme established by Congress in Title VII, and is contrary to the statute's plain meaning.

The regulation is therefore not entitled to legislatively-mandated deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), or under the judicially-developed norms enunciated in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), and most recently in *U.S. v. Mead Corp.*, 121 S.Ct. 2164 (2001).

Equitable estoppel principles can be used to ameliorate any situations where, unlike this case, a strict adherence to the statutory charge requirements and filing deadlines would lead to unduly harsh results. The court of appeals ruling should therefore be affirmed.

ARGUMENT

I. THE EEOC REGULATION IS INVALID BECAUSE IT IS INCONSISTENT WITH THE PLAIN MEANING OF THE STATUTE.

The first step in assessing the validity of any agency regulation, regardless of the "deference" test used, if any, is to determine the meaning of the statute or statutes upon which the regulation rests. See *U.S. v. Mead Corp.*, 121 S. Ct. at 2174; *Chevron,* 467 U.S. at 842-843.

Section 706 of the Civil Rights Act of 1964 as amended in 1972 (the "Act" or "Title VII") sets out the requirements for filing charges of discrimination with the EEOC. The statute requires that "charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires." Section 706(b) of the Act, 42 U.S.C. §2000e-5(b). Charges must be filed within a certain period of time "after the alleged unlawful employment practice occurred," that period being 300 days in states, like Virginia, having "a State or local agency with authority to grant or seek relief" from alleged unlawful employment practices. Section 706(e)(1) of the Act, 42 U.S.C. §2000e-5(e)(1). Finally, the statute requires that the "notice of the charge (including the date, place and circumstances of the alleged unlawful practices) shall be served upon the person against whom such charge is made within ten days" of filing with the EEOC. Sections 706(b) & (e)(1) of the Act, 42 U.S.C. §2000e-5(b) & (e)(1).

Any ordinary lay person reading §706 of the Act would conclude that charges of discrimination must be filed with the EEOC in writing, under oath, within the appropriate time limit, and served on the employer within ten days thereafter. The average intelligent reader would most assuredly not conclude from the statutory language that the charge did not have to be in writing and under oath at the time it was filed, or that the charge did not have to be served on the employer within ten days of the filing. Yet this is exactly the interpretation the petitioner and the EEOC would have this Court give the statute, by giving the word "charge" different meanings in subsections (b) and (e), and in different sentences within subsection (e) of Section 706 of the Act. Petitioner's proposed construction is contrary to the plain meaning of the statute.

A. The EEOC Regulation Conflicts With The Plain Meaning of the Statute.

This Court has taught that "[t]he plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997). Congress spoke plainly when it enacted the 1972 amendment to §706(b) of Title VII, specifying that "[c]harges shall be in writing under oath or affirmation." "Shall" is a word of command. Therefore the plain language of this portion of the statute, standing alone, requires that a "charge" be both in writing and under oath or affirmation.

After the conjunction "and," §706(b) of the Act separately requires, again through use of the word "shall," that charges "contain such information and be in such form as the Commission requires." This phrase creates a statutory "gap" and delegates authority to the EEOC to specify the informational content and form of charges, which the EEOC has done in subsection (a) of 29 C.F.R. §1601.12. There is, however, no "gap" for the EEOC to fill in the first portion of the statutory command. Instead, the statute plainly requires that in order to constitute a charge, a complaint must be in writing under oath or affirmation. There is no mention of a role for the EEOC in interpreting or elaborating upon this requirement, nor is there a need for one, as the requirement is simple and self-explanatory.

Moreover, the context of the language supports a consistent reading of the term "charge" within §706. Section 706 is the first section of Title VII dealing with the procedures to be followed when filing a charge. Subsection 706(b) is the first of the subsections within §706 to use the word "charge"; therefore, it is logical that Congress would

also place the defining characteristic of the word "charge" within this subsection. Section 706 of the Act specifies in subsection (b) that charges be in writing under oath and provides in subsection (e) that a "charge under this *section* [706] shall be filed within one hundred and eighty days." 42 U.S.C. §2000e-5(e) (emphasis added). Rather than allowing the inference that a "charge" may be defined differently in each subsection, as suggested by the petitioner and the EEOC, Congress used the word "section" rather than "subsection" to signify that "charge" has the same meaning throughout §706. The petitioner's argument that subsections (b) and (e) are not linked and should not be interpreted consistently defies logic and bends the statute out of shape.

This Court has held with regard to this very section of the Act that it would be unreasonable to give a word "two different meanings in the same section of the statute." *Mohasco Corp. v. Silver*, 447 U.S. 807, 826 (1980). In *Mohasco*, the question was whether Congress intended the word "filed" to "have the same meaning in subsections (c) and (e) of § 706 of the Civil Rights Act of 1964." *Id.* at 809. There, the *pro se* petitioner and the EEOC argued that giving the word "filed" the same meaning in both subsections would add a technical obstacle to the filing of a charge by an unrepresented complainant.

In rejecting the petitioner's (and EEOC's) argument in *Mohasco*, the Court followed the same course the College believes it should follow here. It first looked at the plain meaning of the statutory language. It then reviewed the legislative history of the 1964 Act and the 1972 amendments to the Act to see if Congress intended the statute to have a different, non-obvious meaning. Finally it considered and rejected policy arguments in favor of a non-obvious meaning. *Mohasco*, 447 U.S. at 815.

In *Mohasco*, the employer had discharged an employee on August 29, 1975. On June 15, 1976—291 days later—the employee sent a letter to the EEOC claiming he had been discharged due to religious discrimination. Since §706 of the statute prohibits filing a charge with the EEOC in a deferral state "before the expiration of sixty days after proceedings have been commenced" with the State deferral agency, "unless such proceedings have been earlier terminated," the district court ruled that the charge was late when filed with the EEOC, because it was filed later than 240 days after the discrimination alleged.[15]

The Court of Appeals for the Second Circuit reversed the district court, ruling that even though the charge was filed late according to the literal terms of the statute, it should nonetheless be ruled timely in view of the "overriding purpose of the Act," and in view of an EEOC regulation, 29 C.F.R. §1601.12(b)(1)(v)(A) (1977) which provided that the EEOC would consider a charge to be "filed" with the EEOC on the 300th day following the alleged discrimination in a deferral state, unless the EEOC had been notified of the earlier termination of State or local proceedings by the deferral agency. In reaching this result, the court of appeals had to give the word "filed" in §706(e) and (c) two different meanings, deeming a charge to be "filed" for purposes of §706(e) when received by the EEOC, as provided in the EEOC regulations, and to be "filed" as required by §706(c) only when the state deferral period had ended.

---

[15] There was apparently no worksharing agreement between the EEOC and the New York deferral agency at the time, whereby the state agency designated the EEOC as its agent for receipt of charges, and automatically waived and terminated the 60-day deferral period established by Title VII. See *EEOC v. Commercial Office Prods. Co.*, 486 U.S. at 112. Congress had authorized the EEOC to enter into these worksharing agreements in §709(b) of the Act, 42 U.S.C. §2000e-8(b). The EEOC has used them extensively, especially since the decision in the *Commercial Office Products* case.

This Court reversed the court of appeals. Writing for the majority, Justice Stevens reasoned that giving the word "filed" two different meanings within the same section of the statute made no sense linguistically, and would alter the balance struck in the procedural scheme set out in the statute, as informed by its legislative history. The Court rejected the suggestion that the EEOC had the power to "interpret" the statute in a manner that would "supersede the language chosen by Congress." *Mohasco*, 447 U.S. at 825.

The same reasoning applies to this case. It makes no sense linguistically that Congress would have used the term "charge" to mean different things in the same section of the statute, as urged by the petitioner and the EEOC. The "charge" that "shall be filed" within the statutory time limit and "shall be served" on the employer within ten days of filing is self-evidently the same "charge" that "shall be in writing under oath." This was found to be the plain meaning of the statute by the court below.

In rejecting the argument for construing "filing" to have two different meanings in §706, this Court explained in *Mohasco* that

> [w]e believe that a lay person [reading §706] would be more apt to regard the general obligation of filing within 180 days as the standard of diligence he must satisfy, and that one who carefully read the entire section would understand it to mean exactly what it says.

Mohasco, 447 U.S. at 825. Here, a lay person need only look at the full text of §706 to find that a charge "shall be in

writing and under oath" and shall be filed within certain time limitations.[16]

B. The Legislative History Supports The Plain Meaning Of The Statute.

Although this Court has often noted there is no need to consider the legislative history of Title VII if the literal reading of the statute does not lead to "absurd or futile results," *Mohasco*, 447 U.S. at 818, *accord, Sutton v. United Airlines*, 527 U.S. 471, 482 (1999), the legislative history of §706 of the Civil Rights Act of 1964 as amended in 1972 supports the straightforward interpretation of the statutory language adopted by the court of appeals in this case.

The current language of §706 of the Act is the product of an amendment offered by Senators Allen and Ervin during the floor debate over the Senate version of the Equal Employment Opportunities Act of 1972 (S. 2515). The original version of S. 2515 did not contain the requirement that EEOC charges be verified, providing only that a charge be written.[17] When questioned about this

[16] This basic information can, and should, be provided by the EEOC to potential claimants when they first contact the agency, a procedure which would eliminate many of the problems unrepresented claimants may have experienced in seeking to comply with the statutory requirements. The EEOC does not routinely do this now, though it would be simple to do so. As acknowledged in its *amicus* brief, the EEOC sends those who first contact it by telephone a lengthy questionnaire, which does not inform claimants of either the applicable time limit or oath requirement. EEOC Brief at p. 24 n.14. These questionnaires do not contain a blank for a verified signature, though they easily could. Also, EEOC Form 5, although it contains a blank for a verified signature, does not indicate the applicable time limit, possibly leaving many claimants unaware of the deadline they must meet in returning the charge form. JA 62.

[17] STAFF OF SENATE SUBCOMM. ON LABOR OF THE COMM. ON LABOR AND PUBLIC WELFARE, 92D CONGRESS, 1ST SESS., PROPOSED

omission during floor debate, Senator Williams, the bill's major proponent in the Senate, stated that he did not know why the oath requirement had been omitted, essentially acceding to Senator Allen's suggestion that the omission was due to mere inadvertence.[18]

Senator Allen proposed an amendment curing the omission by adding a separate subsection to §706 of the bill providing that "[a]s used in this act, the term 'charge' shall mean an accusation of discrimination supported by oath or affirmation."[19] Senator Allen stated that this amendment would simply preserve what he believed to be the existing requirement under the 1964 Act that charges be under oath.[20]

EQUAL EMPLOYMENT OPPORTUNITIES ENFORCEMENT ACT OF 1971 at 34 (Comm. Print 1971), *reprinted in* LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972 at 1971 (1972) (section-by-section analysis of Equal Employment Opportunities Enforcement Act of 1972).

[18] 118 CONG. REC. 2182-83 (1972) (Senate, Feb. 21), *reprinted in* LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972 at 1672 (1972).

[19] 118 CONG. REC. 2182-83 (1972) (Senate, Feb. 21), *reprinted in* LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972 at 1672 (1972). Senator Ervin had authored the amendment.

[20] Section 706(a) of the 1964 Act provided in pertinent part that:

> [w]henever it is charged in writing under oath by a person claiming to be aggrieved, or a written charge has been filed by a member of the Commission where he has reasonable cause to believe a violation of this title has occurred (and such charge sets forth the facts upon which it is based) that an employer, employment agency, or labor organization has engaged in an unlawful employment practice, the Commission shall furnish such employer, employment agency, or labor organization (hereinafter referred to as the "respondent") with a copy of such charge and shall make an investigation of such charge, provided that

Senator Williams did not oppose preserving the oath requirement, but preferred keeping it in the same subsection of §706 of the bill where it had been located in the original Civil Rights Act of 1964. Senator Allen responded that he thought it best to place the definition in a separate subsection, since there were several subsections of §706 that referred to a "charge," and he wanted "one coverall, blanket statement" defining that term, avoiding the necessity to amend the bill in each of the 4 or 5 subsections that referred to a "charge." Senator Williams responded by proposing that this could be accomplished simply by placement of the oath requirement "at the very beginning" in §706(b): "charges shall be in writing under oath or affirmation…." 118 Cong. Rec. 2182-83 (1972).[21] This amendment was

---

such charge shall not be made public by the Commission….

Prior to the 1972 amendments, the Act's provision concerning oaths could be read as merely "prefatory language," rather than a "clearly stated statutory prerequisite." *Vason v. Montgomery*, 240 F.3d 905, 907 n.2 (11th Cir. 2001) (citations and internal quotation marks omitted). The amendment under discussion eliminated this possible interpretation. It should be noted that several of the principal cases upholding the validity of the EEOC regulation to the extent it allows verification of a charge after expiration of the limitations period are based on this earlier version of the statute. See *Weeks v. Southern Bell Telephone & Telegraph Company*, 408 F.2d 228 (5th Cir. 1969); *Georgia Power Company v. Equal Employment Opportunity Commission*, 412 F.2d 462 (5th Cir. 1969); *Blue Bell Boots, Inc. v. Equal Employment Opportunity Commission*, 418 F.2d 355 (6th Cir. 1969); *Choate v. Caterpillar Tractor Company*, 402 F.2d 357 (7th Cir. 1968).

[21] The exchange between Senators Allen and Williams reads as follows:

> Mr. Allen. No sir. The amendment adds a new section at the end of section 4, and it is between lines 19 and 20 on page 50 of the bill. It merely states that the word "charge" as used in the act shall be a charge supported by oath or affirmation.

adopted by voice vote, *Id.*, and survived the conference committee to be enacted into law. In refining the language of §706 of the bill, it is clear that Senators Allen, Ervin and Williams all had the understanding that the term "charge" would have a common meaning throughout the statute.

> Mr. Williams. I wonder if the Senator would refer to the bill at page 34, and whether this would not be the place to make the bill conform to present law.
> Mr. Allen. The only reason we did not put it there would have been because four or five subsections start off with reference to a charge, and it would have been necessary to amend the bill at about four or five places, whereas if we add one coverall blanket statement it would cover the matter without trying to amend it at four or five different points, and possibly not covering every one.
> Mr. Williams. The present law makes the requirement in one place, and it is in section 706.
> Mr. Allen. Yes.
> Mr. Williams. "Whenever it is charged in writing under oath." I do not know why it was taken out of the bill, but I would think that would be the place to put it back.
> Mr. Allen. As I stated, if it were put back, it would also have to be put back on page 35, subsection (c), where it refers to the cases of a charge; it would also have to be put on page 36, subsection (d) where it refers to the case of a charge; it would also have to be put on page 37, subsection (e) where it refers to the case of a charge.
> Mr. Williams. If the Senator will yield further, if it could be done in one place, it probably would be best to do it in section 706(b) where the requirement would be put at the very beginning. That would be on line 21, page 34, of the bill before the Senate.

118 CONG. REC. 2182-83 (1972) (Senate Feb. 21), *reprinted in* LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972-73 (1972).

The 1972 amendments to Title VII also made several other changes pertinent to filing charges with the EEOC. In the first place, the 1972 amendments extended the basic time period for filing a charge with the EEOC from 90 to 180 days, and from 210 to 300 days in deferral states. Congress also added a requirement that the EEOC notify employers within ten days of the filing of charges,[22] deploring the long delays in notification under the 1964 Act as violations of the legitimate rights of employers.[23]

Taken together, the 1972 amendments reflected a congressional compromise with respect to charge filing requirements: Congress substantially lengthened the time for filing charges, but provided that the oath or affirmation was an essential element of a "charge," and required that "charges" be served on employers within a short time after filing. This legislative history confirms a congressional judgment that "most genuine claims of discrimination would be promptly asserted and that the costs associated with

---

[22] The 1964 Act had specified no time limit for providing respondents with notice of charges against them. See note 20, *supra*.

[23] H.R. CONF. REP. NO. 92-899, 92D CONG., 2D SESS. 1 (1972), *reprinted in* LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972 at 1822 (1972); STAFF OF SENATE SUBCOMM. ON LABOR OF THE COMM. ON LABOR AND PUBLIC WELFARE, 92D CONG., 2D SESS., TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 SHOWING CHANGES MADE BY PUBLIC LAW 92-261 APPROVED MARCH 24, 1972 at 8 (Comm. Print 1972), *reprinted in* LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT ACT OF 1972 at 1899 (1972). The 10-day notice requirement was added by the Senate Committee on Labor and Public Welfare. *Compare* STAFF OF SENATE SUBCOMM. ON LABOR OF THE COMM. ON LABOR AND PUBLIC WELFARE, 92D CONGRESS, 1ST SESS., PROPOSED EQUAL EMPLOYMENT OPPORTUNITIES ENFORCEMENT ACT OF 1971 at 34, (Comm. Print 1971), *reprinted in* LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972 at 1971 (1972) (section-by-section analysis of Equal Employment Opportunities Enforcement Act of 1972), *with* S. REP. NO. 92-415, 92D CONG., 1ST SESS. 25 (1971), *reprinted in* LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972 at 434 (1972).

processing and defending stale or dormant claims outweigh the federal interest in guaranteeing a remedy to every victim of discrimination." *Mohasco*, 447 U.S. at 820. Thus the legislative history of Title VII supports the straightforward meaning of §706 found by the court below.[24]

C. Policy Considerations Do Not Justify Deviating From The Plain Meaning Of The Statute.

Although the petitioner and the EEOC correctly note that "the 1964 statute was enacted to implement the congressional policy against discriminatory employment practices, and that that basic policy must inform construction of this remedial legislation," *Mohasco*, 447 U.S. at 818, this principle is of no help to petitioner here. The explicit statutory requirements that "charges" be in writing and under oath, and filed and served on employers within a certain period of time—measured ~~in~~ days and not years—reflect a policy judgment by Congress that "the costs associated with processing and defending stale or dormant claims outweigh the federal interest in guaranteeing a remedy to every victim of discrimination." *Mohasco*, 447 U.S. at 820. Neither the EEOC nor the courts are free to override this fundamental Congressional policy choice.

---

[24] Petitioner claims that reading the statute to require that charges be filed under oath within the limitations period would be imposing "a requirement more onerous than Congress believed was reasonable for states and localities to require in order to commence a [sic] proceedings under state or local laws." Petitioner's Brief at 12. However, when viewed in light of Congress' intention to "keep primary, exclusive jurisdiction in the hands of the State commissions and to avoid federal intervention unless its need was demonstrated," see 110 CONG. REC. 8193, 13087 (1964) (remarks of Sen. Dirksen); *Mohasco*, 447 U.S. at 821, it does not seem unreasonable that Congress would require that resort to the federal remedy would entail different or even more stringent requirements than the state or local remedies.

Petitioner's argument that literal or technical readings of Title VII are "'particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process,'" *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 397 (1982), *quoting Love v. Pullman*, 404 U.S. 522, 527 (1972), is similarly unavailing. The statutory oath and filing requirements are hardly complex or technical concepts beyond the ken of ordinary laymen unassisted by counsel. The requirement of filing a document under oath within a certain time limit is as commonplace and familiar to laymen as the requirement of filing a tax return or request for an extension by April 15 of each year. Thus the policy of liberal construction of an arcane or technical provision of Title VII out of deference to a hypothetical "layman, unassisted by trained lawyers" is simply inapplicable here.

In rejecting the *pro se* petitioner's (and EEOC's) argument that Title VII's procedural requirements should be interpreted liberally, "in the interest of justice," in *Mohasco* this Court noted that

> in the long run, experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law.

Mohasco, 447 U.S. at 826.

The petitioner and the EEOC make several policy arguments for a liberal interpretation of the statute under the rubric of step two of *Chevron* analysis that are designed to convince the Court that disastrous results would occur if the statute is given effect as written. First, the petitioner argues that if unsworn complaints and intake questionnaires are not

deemed to be "charges," then the EEOC might begin to post them on its website. Petitioner's Brief at 10-11. This argument does not present *amicus* EEOC in a very favorable light. In any event, there is overwhelming authority that intake questionnaires do not ordinarily constitute charges, see, *e.g.*, *Pijnenberg v. West Georgia Health System, Inc.*, 255 F.3d 1304 (11th Cir. 2001), and yet the EEOC does not post questionnaires on its website, so this member of the "parade of horribles" has little force.

The petitioner also argues that if unsworn complaints are not deemed to be "charges," then "in some cases" individuals who send unsworn letters to the EEOC would fall outside the protection against retaliation by employers for protected activity set out in §704 of the Act, 42 U.S.C. §2000e-3(a). Petitioner's Brief at 11. Although the word "charge" is indeed used in that portion of the statute, the statute also prohibits discrimination against an individual because he has "participated in any manner in an investigation, proceeding, or hearing under this subchapter," and against any individual because he has "opposed any practice made an unlawful employment practice by this subchapter." Together, these provisions have been held sufficiently broad to include employees who believe that they have been discriminated against but have never gone to the EEOC at all, much less filed a charge with that agency. See, *e.g.*, *Laughlin v. Metropolitan Washington Airports Authority*, 149 F.3d 253, 259 (4th Cir. 1998) (protected activity under Title VII includes participation in informal grievance procedures); *Knox v. State of Indiana*, 93 F.3d 1327, 1333, 1335 (7th Cir. 1996) (employee's internal complaint about sexual harassment by her supervisor constituted protected activity); *Kotcher v. Rosa and Sullivan Appliance Center, Inc.*, 957 F.2d 59, 64-65 (2nd Cir. 1992) (internal complaint constituted protected activity); *Novotny v. Great American Federal Savings & Loan Assoc.*, 584 F.2d

1235, 1259-1260 (3rd Cir. 1978) (protected activity does not have to take place in context of formal EEOC charge); *Sias v. City Demonstration Agency*, 588 F.2d 692, 695 (9th Cir. 1978) (protected activity included employee's letter to HUD complaining of discrimination against him and others); *Smith v. Golf Enterprises*, 1997 WL 279814 (N.D.Tex. 1997) (employee's telephone call to EEOC constituted protected activity under this section); *Troy v. Bay State Computer Group, Inc.*, 1994 WL 562591 (D.Mass. 1994) (same); *Croushorn v. Board of Trustees of University of Tennessee*, 518 F.Supp. 9, 21-23 (M.D.Tenn. 1980) (employee's announcement of intent to file an EEOC charge constituted protected activity).

Finally, the EEOC suggests that if EEOC "charges" are required to be under oath, the EEOC could no longer refer unsworn complaints to state and local agencies for investigation. EEOC Brief at 25. However, as the petitioner acknowledges, §706(c) of the Act authorizes the EEOC to forward unsworn complaints to the state or local agency, so invalidating the portion of the regulation in conflict with the statute would not prevent the EEOC from continuing this practice. Petitioner's Brief at 11-12.

Because the regulation is in conflict with the plain meaning of the statute to the extent that it allows verification of a charge after the limitations period, the regulation is invalid with or without resort to any "deference" theory and the court of appeals should be affirmed.

II. THE EEOC REGULATION RELIED ON BY PETITIONER IS ENTITLED TO NO DEFERENCE.

Finding no support for his position in the language of the statute or in its legislative history, petitioner seeks to prevail by arguing that the courts are required to give

deference to a portion of an EEOC regulation which allegedly operates to excuse his late filing. He claims that this Court's ruling in *Chevron* mandates this result. Petitioner is wrong, as this Court need not go beyond the first step of *Chevron* analysis, if it applies *Chevron* at all.

A. *Chevron* Deference Is Inappropriate.

The *Chevron* deference doctrine rests on the principle that when Congress has explicitly or implicitly delegated to an agency authority to elucidate a specific provision or fill a gap in a statute, courts must defer to reasonable agency interpretations of the statute made pursuant to that delegated authority. *U.S. v. Mead Corp.*, 121 S.Ct. at 2171-72. *Chevron* deference is not appropriate where there is doubt that Congress intended to delegate particular interpretive authority to an agency, *Christensen v. Harris County*, 529 U.S. 576, 596-597 (2000) (Breyer and Ginsberg, JJ., dissenting), where the agency interpretation is contrary to the plain language of the statute, *U.S. v. Mead Corp.*, 121 S. Ct. at 2171; *EEOC v. Commercial Office Prods. Co.*, 486 U.S. at 126-127 (Stevens, Rehnquist, and Scalia, JJ., dissenting), or where the agency interpretation of the statute is not reasonable in light of the principles of statutory construction courts normally employ. *EEOC v. Arabian American Oil Company*, 499 U.S. 244, 260 (1991) (Scalia, J., concurring). Applying these principles, *Chevron* deference to the EEOC regulation is not appropriate here.

1. Any *Chevron* Inquiry Should End At Step One.

This Court has repeatedly emphasized that the EEOC was not given plenary regulatory or rulemaking power by the Civil Rights Act of 1964 or its 1972 amendments. *EEOC v. Arabian American Oil Company*,

499 U.S. 244, 257-258 (1991); *General Electric Co. v. Gilbert*, 429 U.S. 125, 141 (1976). Although Congress did give the agency authority "to issue…suitable procedural regulations to carry out the provisions of this subchapter" in §713(a) of the Act, 42 U.S.C. §2000e-12(e), this does not operate as a delegation of authority to the agency to make rules, procedural or otherwise, that alter or effectively eliminate requirements mandated by the plain meaning of the statute. The specific delegation of authority to the EEOC in relation to "charges" is simply that charges "shall contain such information and be in such form as the Commission requires." §706(b) of the Act, 42 U.S.C. §2000e-5(b). As noted by the majority in the circuit court, even though the Act therefore gives the agency the power to delineate the form and informational content of charges, Congress noticeably did not give the agency the power to "tamper with" the statutory requirements that charges be in writing, under oath, and filed within the limitations period. JA 37. There are no ambiguities or gaps in these aspects of the statutory scheme that Congress has expressly or impliedly empowered the EEOC to "elucidate or fill." *U.S. v. Mead Corp.*, 121 S.Ct. at 2171. The only "ambiguity" in the statute is created by the EEOC regulation itself, which throws into doubt the filing deadline for charges and the time in which a respondent must be notified of a charge. *Chevron* deference is therefore inappropriate at step one.

This is especially so since the regulation in question is contrary to the plain meaning of the statute. While it is unclear exactly what statutory term is being elucidated, interpreted or defined by the EEOC in the regulation,[25] what

[25] The regulation provides that a charge is sufficient when the Commission receives from the person making the charge a written statement sufficiently precise to identify the parties, and to describe generally the action or practices complained

is clear is that its effect is to allow unsworn complaints to be treated as "charges" and to allow the filing of charges "in writing under oath or affirmation" after the statutory limitations period. Thus the effect of the regulation is to define "charge" to mean one thing in §706(b) of the Act and another in §706(e). As was demonstrated above, a uniform reading of the term "charge" throughout §706 gives effect to the plain language of the statute without leading to "absurd or futile results." *Mohasco*, 447 U.S. at 818. Furthermore, such a reading accords with a "coherent and consistent" statutory scheme. See *Robinson*, 519 U.S. at 341. Therefore, the plain language, the specific context, and the broader context of the statute as a whole weigh in favor of giving "charge" one meaning throughout §706. The plain language of the statute accordingly requires that any *Chevron* inquiry end at step one.

2. The Regulation Is Unreasonable At *Chevron* Step Two.

Should this Court determine that there is a statutory ambiguity in §706 that the EEOC has been empowered by Congress to fill, the Court must then move to *Chevron* step two. This entails a determination whether the agency's interpretation of the statute is a reasonable one, consistent with the "general congressional purpose." *U.S. v. Haggar Apparel Co.*, 526 U.S. 380, 393 (1999). As demonstrated above, the agency regulation is manifestly inconsistent with the "general congressional purpose" expressed in §706 of the Act, and is therefore unreasonable.

of. A charge may be amended to cure technical defects or omissions, including the failure to verify the charge…. Such amendments…will relate back to the date the charge was first received.

Petitioner and the EEOC rest a major part of their *Chevron* step two argument in support of the "reasonableness" of the EEOC regulation on analogies to NLRB regulations and Federal Rule of Civil Procedure 15. Should this Court find it appropriate to reach *Chevron* step two, these analogies should be rejected.

As the petitioner concedes, the National Labor Relations Act ("NLRA"), §29 U.S.C. §160(b), "does not itself require" that a charge be made under oath. Petitioner's Brief at 14. Rather, the regulations promulgated by the National Labor Relations Board imposed the oath requirement. Therefore, the court in *Union Starch & Refining Co. v. National Labor Rel. Bd.*, 186 F.2d 1008 (7th Cir. 1951), relied on by the petitioner, did not decide a case in which an agency had by regulation relaxed the requirements of a statute. In fact, none of the cases cited by the petitioner address relaxation of requirements imposed by Congress, only those imposed by the agency itself.

Accepting petitioner's position that Congress initially modeled Title VII after the NLRA, the differences in the language of the two Acts should be interpreted to have some meaning. Perhaps Congress was aware of the NLRA's lack of an oath requirement and concluded that such a requirement should be included in Title VII. In any event, courts must "give effect to the statute as enacted"—that is, that "charges" must be both in writing and under oath. See *Mohasco*, 447 U.S. at 818-19. As pointed out above, the EEOC has no power to alter that requirement, or the filing deadline for charges, regardless of what powers the NLRB may have under different legislation.

The petitioner's analogy to practice under FRCP 15 and similar state rules also fails. The issue here is whether Congress vested the EEOC with the power to alter a

substantive requirement included by Congress in the statute creating the right to file a discrimination charge. As demonstrated above, granting the EEOC such power would allow the agency to alter the balance struck in the statute between protecting employees' rights and assuring fairness to employers by diluting the limitations period for asserting the statutory right. Congress vested the EEOC with no such authority. The authority this Court and others may have to allow amendments to various pleadings asserting substantive claims with no statutorily-required oath requirement is simply irrelevant. *Becker v. Montgomery*, 121 S.Ct. 1801 (2001), relied on by the petitioner and the EEOC, dealt with harmonizing two court-made rules of procedure, not a conflict between a statutory requirement and a court-made rule of procedure.

Moreover, in the circumstances where this and other courts have allowed amendments to pleadings to relate back to an earlier filing, such as in *Becker*, the party affected by the pleadings at least had timely notice that the defective pleading had been filed. As demonstrated by this case, under petitioner's interpretation of the EEOC regulations, the respondent gets no notice of the charge at all until the untimely curative amendment is made. This effectively eliminates the statutory requirement of notice to respondents within ten days of filing, thus frustrating the Congressional purpose in creating the prompt notice requirement in the first place.

The EEOC argues in its *amicus* brief that there would be no violence to the statutory scheme in allowing the EEOC to alter the timing of the oath requirement as it has done in its regulation, since employers are not notified of or required to actually respond to charges until they have been put under oath. EEOC Brief at 22. This argument proves too much by half: it underscores the inconsistency of the agency

regulation at issue with the explicit Congressional requirement that respondents be "served" with a copy of a "charge" within ten days of filing. It ignores the violence done by the regulation to the careful balance struck by Congress in lengthening the statute of limitations, but requiring charges to be made under oath and sent to employers within ten days of filing.[26] It also reveals the internal inconsistency of the agency's definitions of "charge" and "filing." A "charge" is deemed by the EEOC to be filed within the limitations period so long as it is in writing, whether or not it is under oath, but it is not deemed to be "filed" for purposes of the statutorily-required notice to the employer until it has been placed under oath. This is exactly the sort of linguistic charade by the EEOC disapproved of by this Court in *Mohasco*.

The regulation is also an unreasonable interpretation of the Act because it undercuts the strong preference expressed by Congress in Title VII that employment discrimination disputes be resolved by conciliation in the EEOC rather than litigation. See *W.R. Grace & Co v. Local Union 759, International Union of United Rubber, Cork, Linoleum and Plastic Workers of America*, 461 U.S. 757, 770-771 (1983). A charge of discrimination under the Act is

[26] Under the system urged as fair by the EEOC, there would be no deadline for verifying a charge, with resulting lengthy delays in notification to the employer. But this Court, as did Congress in 1972, has recognized the unfairness of requiring employers to defend against stale claims. *Mohasco*, 447 U.S. at 820. The employer's investigation and attempted resolution of the claim become more difficult with the passage of time. Memories fade and employees move on. Also, "backpay obligations and the difficulty of reintegrating a terminated worker into the workforce grow with each day that passes before an employment dispute is resolved." *Early v. Bankers Life and Casualty Co.*, 959 F.2d 75, 80 (7th Cir. 1992). "The short statutes of limitations in employment cases have a purpose…and it is ill served when the employer does not receive prompt notice of the dispute." *Early*, 959 F.2d at 80-81, *citing Delaware State College v. Ricks*, 449 U.S. 250, 256-257 (1980).

not meant merely to toll the limitations period so that a complainant may prepare for litigation. Rather, the charge is meant to provide a basis for an EEOC investigation and for attempts at conciliation. As demonstrated by this case, the application of the regulation as argued for by petitioner and the EEOC would allow a complainant to toll the limitations period without notifying the employer of the alleged discrimination until after the time for conciliation or reinstatement had passed. Thus, instead of providing a vehicle for conciliation, the filing of a charge with the EEOC becomes nothing more than a prerequisite for litigation. This is contrary to the "general congressional purpose" expressed in the Act.

Thus the EEOC regulation at issue is not only unauthorized by and inconsistent with the plain meaning of the enabling statute, it is not a reasonable or permissible interpretation of the statute and is not entitled to deference at either step one or step two of *Chevron*.

B. Deference Is Inappropriate Under *Skidmore*.

The EEOC regulation fares no better using the deference analysis set out in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), which this Court has identified as the appropriate analytical framework to use when considering the weight to be given to EEOC regulations under Title VII. See *EEOC v. Arabian American Oil Co.*, 499 U.S. at 257, *citing General Electric Co. v. Gilbert*, 429 U.S. 125, 140-141 (1976).

The *Skidmore* deference doctrine was articulated by Justice Jackson in *Skidmore v. Swift & Co.*, 323 U.S. at 140, as follows:

> The weight [accorded to an administrative] judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

The EEOC regulation in question here was initially promulgated in 1966, without using notice and comment rulemaking.[27] The EEOC re-issued it essentially unchanged in 1977 using notice-and-comment procedures.[28] There is no record of any particular care or thoroughness in the agency consideration of the regulation, and the fact it was promulgated without notice and comment weakens its claim to deference under *Mead*, 121 S.Ct. at 2173. While the regulation is certainly longstanding, it is difficult to see how a 1966 regulation could constitute a "reasoned analysis" of the amendments to §706 of the Act passed in 1972. The regulation made sense as part of the EEOC's internal procedures in processing charges of discrimination under the original Civil Rights Act of 1964, when the phrase "in writing under oath" could be read as merely prefatory language rather than a clear statutory requirement.[29] *Choate v. Caterpillar Tractor Company*, 402 F.2d 357, 359 (7th Cir. 1968) (requirement in 1964 version of Act was "directory

[27] Equal Employment Opportunity Commission Procedural Regulations, 31 Fed. Reg. 10269 (1966).

[28] Equal Employment Opportunity Commission Procedural Regulations, 42 Fed. Reg. 55,388 (1977).

[29] See discussion in note 20, *supra*.

and technical rather than mandatory and substantive"). The regulation became substantively inconsistent with the statute, however, when the 1972 amendments to the Act required that all charges be "in writing under oath or affirmation."

Under *Skidmore*, more deference is due to an agency regulation based on an agency's specialized experience, particularly when the subject of the regulation is highly technical. *EEOC v. Commercial Office Prods. Co.*, 486 U.S. at 115. But as pointed out above, the requirement of filing a charge under oath within a certain time period is hardly an esoteric concept, resting on unique knowledge within the specialized experience of the EEOC.

Agency practice in applying its regulation is also important in deciding the degree of deference owed to the agency regulation. *U.S. v. Mead Corp.*, 121 S.Ct. at 2175. The agency's actions in this case demonstrate that little deference is owed to the regulation. Despite the existence of the regulation, the EEOC did not treat Edelman's unsworn letter as being a charge at all, repeatedly reminded Edelman of that fact, never required Edelman to verify the letter he and the agency now seek to have deemed to be a charge "in writing under oath," and never provided the letter either to the College or the state deferral agency, as is required for "charges" by both the statute and agency regulations.

Finally, under *Skidmore*, the Court will consider other factors that give the agency interpretation the "power to persuade, if lacking power to control." *EEOC v. Arabian American Oil Co.*, 499 U.S. at 257, *quoting General Electric Co. v. Gilbert*, 429 U.S. at 141-142, *and Skidmore v. Swift & Co.*, 323 U.S. at 140. The major arguments in favor of deference made by Edelman and the *amicus* briefs fall into this category, albeit ostensibly under the rubric of step two of *Chevron*.

Petitioner and the EEOC argue that the regulation should be upheld and deferred to in order to accomplish the beneficial statutory purpose of allowing lay people without benefit of counsel to file their charges free of technical requirements imposed by the statute. The short answer to this argument is that accepting it would effectively eliminate any sensible meaning of the limitations period set out in the statute. Congress obviously believed a short limitations period to be important, expressing it in days rather than years. Upholding the power of the EEOC to declare the verification requirement to be a mere "technical" defect in a charge that can be corrected after the statutory limitations period would upset the legislative compromise that allowed passage of the Act in the first place, a compromise based on the assumption that "the costs associated with processing and defending stale or dormant claims outweigh the federal interest in guaranteeing a remedy to every victim of discrimination." *Mohasco*, 447 U.S. at 820.

Moreover, if the EEOC has the power to relegate the statutory oath requirement for charges to mere "technical" status, there would be no principled basis for saying the EEOC could not do the same for the statutory requirement that charges be in writing, declaring that requirement, too, to be a mere "technical" defect that could also be cured long after expiration of the limitations period. The logic of petitioner's deference argument would permit the EEOC to change its regulation to allow post-limitations "curing" of telephonic "charges."

Upholding the regulation here would violate the fundamental principle that implementing regulations or administrative procedures cannot override their authorizing statute. As this Court noted in *Mohasco*,

> [w]e must…reject any suggestion that the EEOC may adopt regulations that are inconsistent with the statutory mandate. As we have held on prior occasions, its 'interpretation' of the statute cannot supersede the language chosen by Congress.

Mohasco, 447 U.S. at 825.

III. INVALIDATING §1601.12(B) WILL NOT UNDULY HAMPER THE ACCESS OF INDIVIDUALS TO THE REMEDIES PROVIDED IN TITLE VII.

To invalidate the portion of the EEOC regulation at issue here would by no means prevent the EEOC from permitting amendments to charges in order to assist claimants. All Title VII requires of claimants in the EEOC is that they file a written sworn charge of discrimination within the limitations period. Congress left to the EEOC the power to determine what else was required. So long as a charge is initially timely filed, in writing, and under oath, the EEOC can allow claimants to make technical amendments to the charge that relate back to the time of filing, as it has in the portion of 29 C.F.R. §1601.12 not at issue here. So, for example, where a charge does not allege the proper legal grounds for an action, the claimant can amend it under this regulation, just as a civil complaint may be amended if the plaintiff fails to state a cause of action upon which relief may be granted.

Equitable tolling remains available to the courts to ameliorate any situations where a strict adherence to the charge requirements and filing deadlines set out in the statute would lead to unduly harsh results. *Zipes v. Trans World Airlines, Inc.*, 455 U.S. at 393.

As courts interpreting Title VII filing requirements have often found, see, *e.g.*, *Lawrence v. Cooper Communities, Inc.*, 132 F.3d 447 (8th Cir. 1998), there may be individual circumstances where the equitable tolling doctrine justifies giving effect to a charge or an intake questionnaire sworn to after the limitations period has expired. Judicial use on a case-by-case basis is the proper domain of equitable tolling: but the need for equitable tolling in some cases is not a good argument for expansion of agency rulemaking power beyond the limits set out in enabling legislation. Nor is this a reason to allow the EEOC to ossify the permissibility of belated verification in a regulation applicable to all cases, including one like Edelman's, where the principles of equitable tolling justify no relief whatsoever.[30]

CONCLUSION

The portion of 29 C.F.R. §1601.12(b) that allows relation back of charges verified after the statutory limitations period exceeds the EEOC's authority and is inconsistent with the statutory scheme. Equitable estoppel principles can be used to temper the harshness of the

[30] The district court ruled that Edelman was not entitled to equitable tolling because his situation "is not one where the delays of anyone beside himself hindered his ability to timely commence proceedings." JA 30. The court of appeals agreed, noting that Edelman was not entitled to equitable tolling of the limitations period for what "is at best a garden variety claim of excusable neglect" (citation omitted). JA 43. This Court denied Edelman's petition for *certiorari* on the equitable tolling question.

statutory limitations period on appropriate facts, which are not present here. The court of appeals ruling should therefore be affirmed.

Respectfully submitted,

ALEXANDER W. BELL
Counsel of Record
MARY V. BARNEY
BELL & BARNEY, PLC
715 Court Street
P. O. Box 739
Lynchburg, VA 24505-0739
434-528-0411
Counsel for Respondent